

STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 07 EMD 266

EEOC No. 16J-2007-00214

In the matter of

Livia G. Almeida
Complainant

v.

DECISION AND ORDER

AM Donuts, Inc. d/b/a Dunkin' Donuts
and Vanessa Silva
Respondents

INTRODUCTION

On May 2, 2007, Livia G. Almeida (hereafter referred to as the complainant) filed a charge with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission) against AM Donuts, Inc. d/b/a Dunkin' Donuts and Vanessa Silva (hereby collectively referred to as the respondents). The charge alleged that the respondents discriminated against the complainant with respect to terms and conditions of her employment and termination of employment because of her disability in violation of Sections 28-5-7 and 42-87-2 of the General Laws of Rhode Island. This charge was investigated. On April 9, 2009, Preliminary Investigating Commissioner Iraida Williams assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the respondents violated the provisions of R.I.G.L. Sections 28-5-7 and 42-87-2. On April 29, 2009, a complaint and notice of hearing issued. The complaint alleged that the respondents discriminated against the complainant with respect to terms and conditions of employment and termination of employment because of her disability.

A hearing on the complaint was held before Commissioner Camille Vella-Wilkinson on November 17, 2009. The complainant was represented by counsel. The respondents did not appear. None of the parties filed a memorandum.

JURISDICTION

Respondent AM Donuts, Inc. d/b/a Dunkin' Donuts (hereafter referred to as AM Donuts) employed four or more people within the State of Rhode Island at the time of the events in question and thus it is an employer within the definition of R.I.G.L. Section 28-5-6(7)(i). AM Donuts was an entity doing business within the state at the time of the events in question and thus it is covered by the prohibitions of Title 42, Chapter 87 of the General Laws of Rhode Island.

AM Donuts is therefore subject to the jurisdiction of the Commission.

Respondent Vanessa Silva was a manager at AM Donuts at the time in question. She acted, directly and indirectly, in the interest of the employer, AM Donuts, and thus she is an employer within the definition of R.I.G.L. Section 28-5-6(7)(i). She was also doing business within the state and thus is covered by the prohibitions of Title 42, Chapter 87 of the General Laws of Rhode Island. Ms. Silva is therefore subject to the jurisdiction of the Commission.

FINDINGS OF FACT

1. The complainant has a disability – depression with psychotic features. She has had this disability for a number of years and has been hospitalized for it on a number of occasions. She takes medication for her disability and receives Social Security disability benefits. The complainant was unable to finish her college degree because of her disability. When the complainant does not sleep at night, she has a continually harder time going to sleep and she becomes symptomatic. Her increased symptoms have included hallucinations. She is a client of Gateway Health Care and receives services from a multi-disciplinary treatment team, including a psychiatrist, nurses, case managers and a vocational specialist.
2. In or around August 2004, the complainant began working for the respondents as a cashier. She worked for the respondents for approximately three years.
3. Ms. Silva was a manager at AM Donuts while the complainant was employed there. The complainant's mother told Ms. Silva about the complainant's disability. The complainant's mother also told Ms. Silva that the complainant could not work nights because of her disability, that the complainant needed to take her medicine for sleeping and that she could not sleep during the days.
4. On occasion, Ms. Silva signed the complainant's name to the complainant's paychecks and paid her in cash, taking money from the checks. Ms. Silva explained that she was taking the money because the register was "short" (did not have the correct amount of money). Ms. Silva did this on one occasion when the complainant had not worked the day in question. When Ms. Silva took the money from the complainant's paychecks, she did not demonstrate that the cash register was "short" or that the complainant was the cause of the "short" cash register. The amount taken was more than \$104.00.
5. When the complainant complained about the amounts taken from her paycheck, Ms. Silva reduced the complainant's hours.
6. Respondents' employees were required to take tests related to store policies on the computer. Ms. Silva took the tests in the name of the complainant. She did not do this for other employees.
7. AM Donuts was open 24 hours a day at the time of the incidents in question. Ms. Silva on occasion scheduled the complainant for night shifts. The complainant told her that she

could not work night shifts, but Ms. Silva continued to schedule her for those shifts. On one occasion, other staff members did not show up and the complainant worked for almost 24 hours straight.

8. There were additional instances when employees would not show up for work. On some occasions, the complainant would call Ms. Silva who would not call her back. On other occasions, Ms. Silva told her that she had to stay at work. The complainant generally continued working but on two occasions, when the complainant did not receive help from Ms. Silva, the complainant closed the store when other employees did not come to work. On one of those occasions, the complainant had already worked a double shift.
9. While the complainant was working at AM Donuts, the symptoms of the complainant's disability became exacerbated. Working the night shift caused the complainant to miss taking medication at the proper time. Working night shifts also caused her to miss sleep. The lack of sleep and inability to take her medication at the proper time would cause the complainant's illness to become symptomatic. Among other things, the complainant was unable to sleep. She was, on at least one occasion, hospitalized when working night shifts caused increased symptoms.
10. When the complainant complained about the night shift, the respondents reduced her hours. The complainant began working for another Dunkin' Donuts facility in addition to working at AM Donuts. The complainant testified that: "... she [Ms. Silva] knew the other manager. She didn't get along with the other manager. So, ... she didn't want me to work for that manager, so she fired me." Trans. p. 22. The respondents terminated the complainant in March, 2007.

CONCLUSIONS OF LAW

The complainant proved by a preponderance of the evidence that she has a disability as defined in the Fair Employment Practices Act, R.I.G.L. Section 28-5-6, and as defined in the Civil Rights of People with Disabilities Act, R.I.G.L. Section 42-87-1.

The complainant proved by a preponderance of the evidence that the respondents discriminated against her with respect to terms and conditions of employment and denial of reasonable accommodation because of her disability, in violation of the Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island (hereafter referred to as the FEPA) and in violation of the Civil Rights of People with Disabilities Act, Title 42, Chapter 87 of the General Laws of Rhode Island (hereafter referred to as the PDA).

The complainant did not prove by a preponderance of the evidence that the respondents discriminated against her because of her disability with respect to termination of employment in violation of the FEPA and the PDA.

DISCUSSION

I. THE COMPLAINANT PROVED THAT SHE HAS A DISABILITY

The FEPA, in R.I.G.L. Section 28-5-6(4), at the time of the actions in question¹, defined disability in relevant part as follows:

"Disability" means any physical or mental impairment which substantially limits one or more major life activities, ... and includes any disability which is provided protection under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. and federal regulations pertaining to the act, 28 CFR 35 and 29 CFR 1630; provided, that whether a person has a disability shall be determined without regard to the availability or use of mitigating measures, such as reasonable accommodations, prosthetic devices, medications or auxiliary aids. As used in this subdivision, the phrase:

...

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; ... or any mental or psychological disorder, such as ... emotional or mental illness

....

The definition of disability in the PDA Section 42-87-1, at the time of the events in question, was essentially identical to the above definition, although in a slightly different format.

The complainant proved that she had a disability as that term was defined under the FEPA and the PDA. The complainant had depression with psychotic features for a number of years; she was hospitalized on a number of occasions. Her illness caused an inability to complete her college degree. If the time when she took her medicine was disrupted, she had difficulty sleeping. She had difficulty sleeping during the day. Lack of sleep increased her symptoms which included increasing difficulty with sleeping and hallucinations. As cited above, under Rhode Island law, the determination of whether an individual has a disability is made without regard to mitigating medications. Considered without her medication, the complainant's

¹ The FEPA and the PDA have been amended since the time of the events in question. The Commission will utilize the statutory language in effect at the time of the events in question.

disability caused substantial impairment of the major life activities of sleeping and thinking. *See Battle v. United Parcel Service, Inc.*, 438 F.3d 856 (8th Cir. 2006) (testimony that the complainant's depression, anxiety and obsessive-compulsive disorder caused him substantial difficulty in concentrating and thinking was sufficient evidence to prove that he had a disability) and *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005) (the plaintiff, who had depression or bipolar disorder, could proceed to trial on his disability claim, his condition substantially interfered with sleeping and thinking which are major life activities).²

II. THE COMPLAINANT PROVED THAT THE RESPONDENTS DENIED HER REASONABLE ACCOMMODATIONS FOR HER DISABILITY

The FEPA and the PDA require employers to make reasonable accommodations for employees' disabilities. R.I.G.L. Section 28-5-7 (1)(iv) provides that it is an unlawful employment practice for an employer: "[t]o refuse to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise, or business". See also R.I.G.L. Section 42-87-3(2).

Ms. Silva knew that the complainant had a disability. Both the complainant and her mother requested that the complainant's disability be accommodated by excluding night shifts from her schedule. The complainant's mother explained that a night schedule disrupted the complainant's medication schedule and affected her ability to sleep. Ms. Silva continued to schedule the complainant for night shifts and continued to require the complainant to take unscheduled night shifts when other employees did not show up. The respondents did not present evidence that excluding night shifts from the complainant's schedule would be an undue burden on the respondents.³ The respondents failed to provide a reasonable accommodation for the complainant's disability. *See Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3rd Cir. 2010) (case

² The Commission utilizes the decisions of the R.I. Supreme Court, the Commission's prior decisions and decisions of the federal courts interpreting federal civil rights laws in establishing its standards for evaluating evidence of discrimination. The Rhode Island Supreme Court has utilized federal cases interpreting federal civil rights law as a guideline for interpreting the FEPA. "In construing these provisions, we have previously stated that this Court will look for guidance to decisions of the federal courts construing Title VII of the Civil Rights Act of 1964. *See Newport Shipyard, Inc.*, 484 A.2d at 897-98." [Center for Behavioral Health, Rhode Island, Inc. v. Barros](#), 710 A.2d 680, 685 (R.I. 1998). It should be noted that in 2007, the definition of "disability" in the FEPA and PDA was broader than the definition in the Americans with Disabilities Act. Compare the 2007 versions of Sections 28-5-6(4) and 42-87-1 of the General Laws of Rhode Island with the 2007 version of 42 U.S.C. Section 12102.

³ The respondents did not present any evidence.

should proceed to trial on the plaintiff's allegations that the defendant denied her a reasonable accommodation for her disability when it would not eliminate night shifts from her schedule; the plaintiff was blind in one eye and could not drive at night; the defendant knew of her disability, she had requested the accommodation and the employer did not make a good faith attempt to accommodate her disability); Gile v. United Airlines, Inc., 213 F.3d 365 (7th Cir. 2000) (jury verdict finding disability discrimination upheld; the employer failed to provide the reasonable accommodation that the plaintiff be transferred away from the night shift; the night shift was exacerbating the symptoms of the plaintiff's disability, depression and anxiety disorder).

III. THE COMPLAINANT PROVED THAT THE RESPONDENTS DISCRIMINATED AGAINST HER WITH RESPECT TO TERMS AND CONDITIONS OF EMPLOYMENT BECAUSE OF HER DISABILITY

The FEPA prohibits employment discrimination on the basis of disability with respect to terms and conditions of employment and termination. R.I.G.L. Sections 28-5-7(1)(i and ii) provide that it is an unlawful employment practice for any employer:

- (i) To refuse to hire any applicant for employment because of his or her race or color, ... disability, ...;
- (ii) Because of those reasons, to discharge an employee or discriminate against him or her with respect to hire, tenure, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment.

The PDA prohibits employment discrimination on the basis of disability. R.I.G.L. Section 42-87-2 provides that: "No otherwise qualified person with a disability shall, solely by reason of his or her disability, be subject to discrimination by any person or entity doing business in the state"

R.I.G.L. Section 42-87-3(2) provides in relevant part that:

- (2) Notwithstanding any inconsistent terms of any collective bargaining agreement, no otherwise qualified person with a disability shall, solely on the basis of disability, who with reasonable accommodation and with no major cost can perform the essential functions of the job in question, be subjected to discrimination in employment by any person or entity receiving financial assistance from the state, or doing business within the state.

R.I.G.L. Section 42-87-1(6) defined an "otherwise qualified" person with respect to employment as "a person with a disability who, with reasonable accommodations, can perform the essential functions of the job in question".

The respondents discriminated against the complainant by failing to allow her to take training tests which other employees were required to take. They further discriminated by cashing her

check for her and taking out money from it. On one occasion, they did this when the complainant had not worked on the day when the cash register was allegedly "short". When the complainant complained about Ms. Silva taking money from her check, the complainant's hours were reduced. These actions demonstrate that the respondents' attitude towards the complainant was that they could impose different terms and conditions of employment on her, that they could exploit her because of her disability. *See Mosley v. Femina Fashions, Inc.*, 356 N.J.Super. 118, 811 A.2d 910 (N.J. Super. A.D. 2002) (the plaintiff's case should proceed to trial; plaintiff, a former employee of the defendant who was unable to speak or hear, presented evidence that the defendant exploited her disability by requiring her to work extra unpaid hours, knowing that she would not protest because of her handicap).

IV. THE COMPLAINANT DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE RESPONDENTS TERMINATED HER BECAUSE OF HER DISABILITY

The courts in *DeCamp v. Dollar Tree Stores*, 875 A.2d 13 (R.I. 2005), *Barros, St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993), *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11 (1st Cir. 2002) and *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996) set forth methods for analyzing evidence of discrimination. According to these methods, the complainant must first establish a prima facie case of discrimination. *DeCamp* provides that a person may prove a prima facie case of disability discrimination in termination by proving that:

(1) he or she was disabled within the meaning of FEPA and RICRA [the Rhode Island Civil Rights Act, Title 42, Chapter 112 of the General Laws of Rhode Island]; (2) that the employee was a "qualified" individual, which means that "with or without reasonable accommodation, she was able to perform the essential functions of her job"; (3) "that the employer discharged her in whole or in part because of her disability." [Cite omitted.] 875 A.2d at 25.

See also Monette which similarly describes how a plaintiff can establish a prima facie case of disability discrimination⁴ in termination by proving that:

1. He or she had a disability known to the employer;
2. He or she was qualified for the position, with or without reasonable accommodation;
3. He or she was terminated/laid off;
4. He or she was replaced.

Once a complainant has made a prima facie case of discrimination, a respondent must present a

⁴ *Monette* analyzed evidence under the Americans with Disabilities Act (ADA), 42 U.S.C. Section 12101 et seq.

legitimate, non-discriminatory reason for its actions. If a respondent has presented legitimate, non-discriminatory reasons for its actions, a complainant may prove discrimination by proving that the reasons given are a pretext for discrimination. Hicks.

In addition to the above method for proving discrimination, the FEPA provides for another way to analyze evidence of discrimination. The FEPA specifically provides that a plaintiff may prove discrimination by proving that discrimination was a motivating factor for the respondent's actions, even though the decision was also motivated by other lawful factors. R.I.G.L. Section 28-5-7.3.

The complainant presented evidence of a prima facie case of disability discrimination. The complainant always retains the burden of persuading the factfinder, in this case the Commission, that discrimination was a motivating factor for the respondents' actions. Hicks. In this case, the Commission was not persuaded that discrimination was a factor in the complainant's termination.

The complainant testified, with respect to her termination: "... she [Ms. Silva] knew the other manager. She didn't get along with the other manager. So, ... she didn't want me to work for that manager, so she fired me." Trans. p. 22. In addition, the Commission takes into consideration the "same actor" inference. In this case, Ms. Silva, the person who terminated the complainant, was also the person who hired her. The respondents knew of the complainant's disability and continued to employ her for three years. This history of employment leads to the inference that the respondents did not discriminate in termination. See Edwards v. Wal-Mart Stores, Inc., 247 F.3d 241 (5th Cir 2001) (unpublished decision) (employer could claim the "same actor" inference in this disability discrimination case when the same person who terminated the complainant hired him; the complainant did not prove disability discrimination in termination); Le Blanc v. Great American Ins. Co., 6 F.3d 836 (1st Cir. 1993) (where the same person who transferred the plaintiff to his district at age fifty-seven terminated the plaintiff two years later, there is an inference that the employer was not motivated by age discrimination). The complainant did not prove, by a preponderance of the evidence, that the respondents were motivated by disability discrimination when they terminated her employment.

RELIEF

R.I.G.L. Section 28-5-24 sets forth the remedies that the Commission can award after finding that a respondent has committed an unlawful employment practice. R.I.G.L. Section 42-87-5(a) provides that: "the commission may proceed in the same manner and with the same powers as provided in §§ 28-5-16 – 28-5-26...". R.I.G.L. Section 28-5-24 provides in relevant part as follows:

§ 28-5-24 Injunctive and other remedies – Compliance. – (a) If upon all the testimony taken the commission determines that the respondent has engaged in or is engaging in unlawful employment practices, the commission shall state its findings of fact and shall issue and cause to be served on the respondent an order

requiring the respondent to cease and desist from the unlawful employment practices, and to take any further affirmative or other action that will effectuate the purposes of this chapter, including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay, or admission or restoration to union membership, including a requirement for reports of the manner of compliance. Back pay shall include the economic value of all benefits and raises to which an employee would have been entitled had an unfair employment practice not been committed, plus interest on those amounts.

...

(3) In appropriate circumstances attorney's fees, including expert fees and other litigation expenses, may be granted to the attorney for the plaintiff if he or she prevails. Upon the submission of reports of compliance the commission, if satisfied with the reports, may issue its finding that the respondent has ceased to engage in unlawful employment practices.

(b) If the commission finds that the respondent has engaged in intentional discrimination in violation of this chapter, the commission in addition may award compensatory damages. The complainant shall not be required to prove that he or she has suffered physical harm or physical manifestation of injury in order to be awarded compensatory damages. As used in this section, the term "compensatory damages" does not include back pay or interest on back pay, and the term "intentional discrimination in violation of this chapter" means any unlawful employment practice except one that is solely based on a demonstration of disparate impact.

The Commission will order the respondents to take steps to eliminate discrimination in the future. Since the Commission did not find that the respondents' termination of the complainant was discriminatory, it will not order the respondents to re-hire the complainant.

The Commission will schedule a hearing where the parties can present evidence as to the appropriate amount of damages to be awarded to the complainant for the actions which the Commission found to be unlawful employment practices. The complainant has submitted a Motion for Award of Attorney's Fees and reserved the right to present evidence on the hours and fee. The Order sets a date for the complainant to submit a more specific Motion for attorney's fees and for the respondents to file a Memorandum in Opposition.

ORDER

I. Violations of R.I.G.L. Sections 28-5-7, 42-87-2 and 42-87-3 having been found, the Commission hereby orders that:

- A. The respondents cease and desist from all unlawful employment practices;
- B. AM Donuts train all of its supervisors on state and federal anti-discrimination laws and provide a certification to the Commission within six (6) months of the date of this Order that the training has been completed, the name of the trainer and a copy of the syllabus;
- C. If Ms. Silva is no longer employed by AM Donuts as a supervisor, Ms. Silva receive training on state and federal anti-discrimination laws and provide a certification to the Commission within six (6) months of the date of this Order that the training has been completed, the name of the trainer and a copy of the syllabus;
- D. AM Donuts post the Commission anti-discrimination poster prominently in its facilities.

II. The attorney for the complainant may file a Motion and Memorandum for Award of Attorney's Fees no later than 30 days from the date of this Order. The respondents may file a Memorandum in Opposition no later than 30 days after receipt of the complainant's Motion. The parties' attention is directed to Banyaniye v. Mi Sueno, Inc. and Jesus M. Titin, Commission File No. 07 PPD 310 (Decision on Motion for Attorney's Fees 2009) for factors to be generally considered in an award of attorney's fees under the FEPA. If either party would like a hearing on the issues involved in the determination of an appropriate award of attorney's fees, the party should request it in the memorandum.

III. The Commission will schedule a hearing on damages at which the parties can present evidence and argument on the appropriate award of damages.

Entered this [11th] day of [June], 2010.

_____/S/_____

Camille Vella-Wilkinson
Hearing Officer

I have read the record and concur in the judgment.

_____/S/_____

Rochelle Bates Lee
Commissioner

_____/S/_____

John B. Susa
Commissioner